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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

SANAZ KASHANI, Plaintiff and Appellant, v. BUNKER HILL TOWER CONDOMINIUM ASSOCIATION, Defendant and Respondent.	B211542 (Los Angeles County Super. Ct. No. BC391586)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elizabeth A. Grimes, Judge. Reversed and remanded.

Saied Kashani, for Plaintiff and Appellant.

Ivie, McNeill & Wyatt, Byron M. Purcell and Peter L. Carr, for Defendant and Respondent.

Sanaz Kashani appeals from the court's judgment dismissing her complaint against Bunker Hill Tower Condominium Association as a SLAPP suit (Strategic Lawsuit Against Public Participation). We reverse and remand.

FACTS AND PROCEEDINGS

Sanaz Kashani and her husband owned a condominium in the Bunker Hill Tower. In January 2007, they sued their condominium association, respondent Bunker Hill Tower Condominium Association, for damage to their condominium.

The association's regularly scheduled annual meeting and election for its board of directors was set for November 14, 2007. Although a member of the association, appellant could not stand for election under the association's by-laws because she was suing the association. Section 5.3 of the by-laws stated: "No person may be a candidate for the Board . . . if the person . . . (b) . . . . Is engaged as an opponent in litigation, arbitration, or mediation with the Association." Five days before the election, appellant told the association she planned to dismiss her lawsuit and run for a seat on the board. The day of the election, appellant filed with the clerk of the court her request for dismissal of all her causes of action. Appellant informed respondent of her dismissal.

The annual meeting and election opened later in the evening after appellant dismissed her complaint. Appellant was nominated for one of the four open seats on the association's board of directors. The board president told the association's gathered members that appellant was ineligible for a seat because she was suing the association. An association member corrected the president by pointing out that appellant had dismissed her lawsuit. The president replied that appellant remained ineligible because she was a co-owner of a condominium unit involved in litigation. The election proceeded, and appellant received the second most votes of all candidates, entitling her to join the board. The association refused, however, to accept the votes for appellant and refused to seat her on the board.

Appellant filed a verified complaint alleging multiple causes of action against the association. She alleged breach of contract based on the association's refusal to recognize her candidacy, count the votes for her, and seat her. She also sought a declaratory judgment of her eligibility to run for the board and equitable relief installing her on the board. In addition, she sought a declaratory judgment voiding the board's actions after the election because those actions would have differed on a number of matters if she had been a voting board member. Finally, she sued for defamation for the association's statement that she was ineligible to run.

The association moved to dismiss appellant's complaint as a SLAPP suit. The association asserted all of appellant's causes of action "arise from the Association and/or its counsel's acts in furtherance of their exercise of their constitutional rights of petition and free speech." Appellant opposed the motion to dismiss. She argued she did not base her complaint on the association's exercise of its right to free speech or petition, which the anti-SLAPP statute (Code Civ. Proc., § 425.16) protected. Instead, her complaint rested on the association's conduct in barring her from running, refusing to count the votes for her, and denying her a seat on the board despite her having won the second most votes.

The court found the election affected a large enough group of association members in a manner akin to governmental activity to rise to the level of a matter of public interest. (See *Ruiz v. Harbor View Community Assn.* (2005) 134 Cal.App.4th 1456, 1461, 1468-1469; *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 474-475.) The court thus found the board president's comments about appellant's eligibility to run for a seat was speech involving a public concern. Moreover, the court found – incorrectly as we explain below – that all of appellant's claims arose from the board president's statements about appellant's purported ineligibility. The court noted: "All of plaintiff's claims are based on defendant's statements made at the Annual Meeting of the Bunker Hill Tower Condominium Association and election of members to its Board of Directors, concerning plaintiff's eligibility for election to the Board of Directors." The court thus

concluded appellant's complaint "arises from an act of the defendant in furtherance of free speech or petition in connection with a public issue" and therefore the anti-SLAPP statute applied. The court entered judgment dismissing appellant's complaint and awarded the association more than $9,000 in attorney's fees and costs. This appeal followed.

DISCUSSION[1]

The anti-SLAPP statute (Code Civ. Proc., § 425.16) permits expedited trial court review of a complaint before a lawsuit gets fully underway, and, when appropriate, dismissal of a complaint targeting the defendant's exercise of freedom of speech or petition. (*Nguyen-Lam v. Cao* (2009) 171 Cal.App.4th 858, 872; *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 80.) Subsection (b)(1) of the statute states: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike . . . ."[2] Subdivision (e) expands on the meaning of the phrase "in furtherance of" the right to speech or petition. It states:

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[1] The association asserts this appeal must fail because appellant did not submit a complete record on appeal or provide proper citations to the record. Neither assertion merits much consideration. The record contains, among other things, appellant's complaint, the association's motion to dismiss under the anti-SLAPP statute, appellant's opposition to the motion, the reporters' transcript for the hearing on the motion, the court's minute order granting the motion, and the final judgment. Moreover, appellant's citations to the record guide us to where we need to look in the record to find support for appellant's assertions.

[2] Amendments to the statute took effect on January 1, 2010, but they are immaterial to our analysis. We note as a stylistic housekeeping matter, however, that subsection (b)(1) to which we refer was amended from "United States or California Constitution" to "United States Constitution or the California Constitution."

> "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: . . . (4) . . . any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

The moving defendant bears the burden of showing a complaint arises from free speech or petitioning activity protected by the anti-SLAPP statute. (*Ruiz v. Harbor View Community Assn., supra*, 134 Cal.App.4th at p. 1466; *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-90 (*Navellier*).) The focus of analysis is whether the gravamen of the complaint is "based" on the protected activity. (*Scott v. Metabolife Intern. Inc.* (2004) 115 Cal.App.4th 404, 413-414.) That focus "disregard[s] the labeling of the claim and instead 'examine[s] the *principal thrust* or *gravamen* of a plaintiff's cause of action to determine whether the anti-SLAPP statute applies' . . . We assess the principal thrust by identifying '[t]he allegedly wrongful and injury-producing conduct . . . that provides the foundation for the claim.' If the core injury-producing conduct upon which the plaintiff's claim is premised does not rest on protected speech or petitioning activity, collateral or incidental allusions to protected activity will not trigger application of the anti-SLAPP statute." (*Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1271-1272.) We independently review the trial court's order granting the association's motion to strike appellant's complaint. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269 fn. 3.)[3]

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[3] Sometimes, only some of a complaint's causes of action may be subject to dismissal under the anti-SLAPP statute, warranting our analysis of each separate cause of action on its own. (*Paul v. Friedman* (2002) 95 Cal.App.4th 853, 866 fn. 24.) Appellant acknowledges that her defamation cause of action might possibly be vulnerable to an anti-SLAPP motion to dismiss, but the association's motion targeted appellant's entire complaint and did not focus on her separate causes of action. Nor does respondent's brief on appeal address separately the libel claim. Accordingly, we review the complaint in its entirety, rather than focusing on its separate claims.

We hold the court erred in dismissing appellant's complaint. The court's error was not its finding that the board election was a matter of public concern, a finding we need not address here. Rather, the court's error was its misapprehension of the gravamen of appellant's complaint. The thrust of the complaint was not the board president's disparagement of appellant's eligibility to serve on the board, which arguably may have been the exercise of free speech on a matter of public concern, thereby triggering scrutiny under the anti-SLAPP statute. The gravamen of the complaint alleged injury from the association's refusal to count the votes for appellant and refusal to let her assume her seat on the board after she won the second most votes. Even if the board president had said nothing about appellant's eligibility, the core of her claims would remain. The complaint therefore did not arise from the association's exercise of its freedom of speech or petition. "[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute. [Citation.] Moreover, that a cause of action arguably may have been 'triggered' by protected activity does not entail it is one arising from such. [Citation.] In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity. [Citations.]" (Italics in original.) (*Nevallier, supra*, 29 Cal.4th at p. 89; see also *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76-78; *Visher v. City of Malibu* (2005) 126 Cal.App.4th 364, 369-370.)

Turner v. Vista Pointe Ridge Homeowners Ass'n (2009) 180 Cal.App.4th 676, is illuminating. There, a homeowner sued his homeowners association for the association's refusal to grant a height variance for improvements the homeowner planned for his house. The homeowner alleged multiple causes of action, including breach of contract and declaratory relief involving the association's CC & Rs. Because the homeowner and association communicated in writing before their dispute erupted into a lawsuit, the association moved under the anti-SLAPP statute to strike the complaint for suing the association over conduct in furtherance of the association's freedom of speech. The

appellate court rejected the association's characterization of the complaint. The court explained:

> "It is true that certain Association demands were made in writing. But the mere fact that the demands were put in writing did not convert the Association's acts in connection with CC & R's enforcement into acts in furtherance of the right of free speech. . . . [T]he act of putting demands concerning CC & R's compliance in writing gave rise to breach of contract and other causes of action that do not raise free speech concerns. Consequently, whether or not the subject matter of the underlying dispute was a matter of public interest, the trial court erred in granting the Association's motion because the Association's actions that formed the basis of the [homeowner's] causes of action were not undertaken in furtherance of the Association's right of free speech."

The circumstances supporting appellant's complaint are similar to those in *Turner v. Vista Pointe Ridge Homeowners*. The board president's comments here may have been speech about a matter of public interest. But the association's actions against appellant involving the tallying of votes and seating of directors were not in furtherance of the president's or association's right to speak.

The association asserts the anti-SLAPP statute applies not only to the exercising of the right to speech and petition, but any *conduct* that affects a sufficiently large number of people to be akin to governmental conduct. The association states, for example: "When private conduct affects a community in a manner similar to that of a government entity, said *conduct* is considered to be of 'public interest' and protected by the anti-SLAPP statute." (Italics added.) Elsewhere it asserts its "*conduct* . . . *barring* [appellant] from the election for [the] Board of Directors is protected conduct within subdivision (e)(4)" of the anti-SLAPP statute encompassing acts in furtherance of the right to speech and petition. (Italics added.)

The association is mistaken. The anti-SLAPP statute applies to conduct in furtherance of the right to speech or petition in a matter involving a public interest. The number of people affected by conduct might help determine whether a matter involves a public interest, but the conduct itself nevertheless must be in furtherance of the right to

free speech or petition – it cannot be simply *any* conduct affecting a large number of people. (See § (e)(4) [anti-SLAPP statute applies to conduct in furtherance right of petition or free speech].) Here, the actionable conduct was not in furtherance of the association president's right to speak about appellant's eligibility for serving on the association's board, because refusing to count votes and barring someone from office is not speech and does not protect free speech.

The association asserts the court correctly dismissed appellant's complaint because she had no reasonable probability of prevailing against the association. According to the association, the complaint was groundless because appellant was ineligible under the association's by-laws to run for the board while she was suing the association over damage to her condominium. This assertion presumes appellant's lawsuit over damage to the condominium continued until the clerk of the superior court entered appellant's dismissal five days after the election (in contrast to ending when she *filed* her request for dismissal on the day of the election). Even if one entertains for the sake of argument the association's prediction of eventual success, we do not address *in a SLAPP motion* the probability of success of a complaint that is not a SLAPP suit.[4] (*City of Riverside v. Stansbury* (2007) 155 Cal.App.4th 1582, 1594.) "If the defendant does not demonstrate this initial prong [that the complaint is a SLAPP suit], the court should deny the anti-SLAPP motion and need not address the second step [of considering the complaint's probability of success]. [Citation.]" (*Hylton v. Frank E. Rogozienski, Inc.*, *supra,* 177 Cal.App.4th at p. 1271.) As the court in *Turner v. Vista Pointe Ridge* noted:

> "[T]he [defendant] also says that the court undertook a careful review of the [plaintiff homeowner's] causes of action and determined that they were meritless. However, inasmuch as we have concluded that the threshold question, whether the challenged causes of action arose from protected activity, is answered in the negative, 'we do not reach the anti-SLAPP statute's secondary question whether

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[4] We express no opinion about the likelihood of the association's success were it to seek the complaint's dismissal by way of, for example, a motion for summary judgment or adjudication.

[the homeowner] "established that there is a probability that [he] will prevail on [his claims]" [citation.]." [Citation.]' " (*Turner* at p. 689.)

DISPOSITION

The judgment is reversed and the trial court is directed to enter a new order denying respondent Bunker Hill Tower Condominium Association's motion to dismiss appellant Sanaz Kashani's complaint as a SLAPP suit.[5] Appellant to recover her costs on appeal.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

BIGELOW, J.

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[5] Because we are reversing based on the court's error in finding appellant's complaint was a SLAPP suit, we do not address appellant's contention that the court violated appellant's right to due process by relying on matters not raised in the association's motion to dismiss.